

IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

JORGE AVILA,

Plaintiff,

v.

TUVERA, et al.,

Defendants.

No. C 15-01265 BLF (PR)

**ORDER DENYING REQUEST FOR  
APPOINTMENT OF COUNSEL;  
GRANTING EXTENSION OF  
TIME TO EITHER FILE SECOND  
AMENDED COMPLAINT OR TO  
STRIKE FIRST AMENDED  
COMPLAINT**

(Docket No. 15)

Plaintiff filed the instant *pro se* civil rights action pursuant to 42 U.S.C. § 1983. On March 18, 2015, Plaintiff commenced this action by filing a complaint alleging that Defendants F. Tuvera, K. Kumar, J. Dunlap, A. Austria, and D. Tyler, had been deliberately indifferent to his serious medical needs by delaying treatment. (Docket No. 2.) However, on April 29, 2015, Plaintiff filed a document titled "Complaint," (Docket No. 11), which the Court treated as a first amended complaint ("FAC").<sup>1</sup> On May 12, 2015, the Court reviewed the FAC and found that it was deficient in numerous ways, including failing to specify how Defendants violated his constitutional rights. (Docket

<sup>1</sup>A first amended complaint supersedes the original complaint. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). "[A]fter amendment the original pleading no longer performs any function and is 'treated thereafter as non-existent' . . ." *Id.* (citing *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967)).

1 No. 12 at 2.) The Court further noted that Plaintiff's initial complaint did not have these  
2 deficiencies. (*Ibid.*) The Court dismissed the FAC with leave to amend and presented  
3 Plaintiff with two options. Plaintiff's first option is to file a second amended complaint  
4 that corrects the deficiencies identified by the court. (*Id.* at 3.) Or, Plaintiff has the  
5 option of striking the first amended complaint (Docket No. 11) and proceeding with the  
6 initial complaint (Docket No. 1). Plaintiff was directed to either file a second amended  
7 complaint or file a motion to strike the first amended complaint by June 9, 2015.  
8 (Docket No. 12 at 2.)

9 On June 15, 2015, the Court received a letter from Plaintiff dated June 5, 2015.  
10 (Docket No. 15.) In this letter, Plaintiff informs the Court that he had been transferred  
11 to a new institution and that he had only recently, on June 2, 2015, received the Court's  
12 May 12, 2015 Order of Dismissal with Leave to Amend. (*Id.* at 1.) He reiterates his  
13 claim that Defendants had violated his constitutional rights by deleting treatment and  
14 failing to provide adequate medical care. (*Ibid.*) He also requests appointment of  
15 counsel, claiming that counsel is necessary because he does not know how to read or  
16 write; he has a TABE score of 1.4; he is under the care of psychiatrists; and because he  
17 does not know what to say or do next. (*Ibid.*) Plaintiff has previously requested  
18 counsel, citing similar reasons, (Docket No. 8), and the Court denied that request for  
19 counsel, (Docket No. 9). Plaintiff's current request for appointment of counsel (Docket  
20 No. 15) is DENIED with prejudice for lack of exceptional circumstances, *see Agyeman*  
21 *v. Corrections Corp. of America*, 390 F.3d 1101, 1103 (9th Cir. 2004), the same reasons  
22 as set forth in the Court's prior order denying appointment counsel. Moreover, a review  
23 of the record indicates that Plaintiff has been able to prosecute this case despite his  
24 alleged illiteracy and psychiatric issues.

25 However, in the interest of justice, Plaintiff is granted an extension of time to  
26 July 13, 2015, to either (1) file a second amended complaint to address the deficiencies  
27 in his first amended complaint, or (2) file a motion to strike the first amended complaint  
28 and proceed with his initial complaint.

1 If Plaintiff chooses option 1, which is to file a second amended complaint, he  
2 may use the court's form complaint. If using the court form complaint, Plaintiff must  
3 answer all the questions on the form in order for the action to proceed. In the second  
4 amended complaint, Plaintiff should list what specific federal rights were violated,  
5 when the alleged violations occurred, and how each defendant was responsible for the  
6 violations. Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain  
7 statement" of each claim. Fed. R. Civ. P. 8(a)(2). The second amended complaint must  
8 include the caption used in this order, the civil case number used in this order, Case No.  
9 C 15-01265 BLF (PR), and the words "SECOND AMENDED COMPLAINT" on the  
10 first page.

11 If Plaintiff chooses option 2, he should file a motion titled "Motion to Strike First  
12 Amended Complaint." In this motion, he should request that the Court strike the first  
13 amended complaint and that the action proceed on the initial complaint, which was filed  
14 on March 18, 2015.

15 **Failure to respond in accordance with this order by July 13, 2015, will result**  
16 **in the dismissal of this action without prejudice and without further notice to**  
17 **Plaintiff.**

18 The Clerk shall include two copies of the court's complaint with a copy of this  
19 order to Plaintiff.

20 **IT IS SO ORDERED.**

21  
22 DATED: June 19, 2015

  
BETH LABSON FREEMAN  
United States District Judge